SERVED: August 28, 1992

NTSB Order No. EA-3669

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of August, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. JOEL RUSSELL PROSSER, Respondent.	Docket SE-12616

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jerrell R. Davis rendered in this proceeding on July 21, 1992, at the conclusion of an evidentiary hearing.[1] By that decision the law judge affirmed an emergency order of the Administrator revoking respondent's commercial pilot certificate for numerous alleged violations of Part 91 of the

[1]An excerpt from the hearing transcript containing the initial decision is attached.

Federal Aviation Regulations (FAR, 14 CFR Part 91) in connection with his alleged operation of an aircraft at Reno-Cannon International Airport on December 30, 1991. Because we find, as discussed below, no merit in any of respondent's objections to the law judge's decision, we will deny his appeal.[2]

In the emergency order of revocation, which the Administrator amended on July 7, 1992 and which served as the complaint in this action, the following facts and circumstances, among others, are alleged concerning the respondent:

> 1. You are now, and at all times mentioned herein were, the holder of Commercial Pilot Certificate No. 554457044.
>
> 2. On or about December 30, 1991, you were the owner, and you were acting as pilot-in-command of a Cessna 210, Civil Aircraft N8103Z operating in the Reno, Nevada area.
>
> 3. On the above date, you operated into Reno-Cannon International Airport (hereinafter referred to as Reno-Cannon) and parked your aircraft at Mercury Aviation for a re-fueling, using the name Joel Parsons.
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> 4. Reno-Cannon has a control tower operated by the United States.
>
> 5. Upon your departure from Reno-Cannon, you failed to maintain two-way radio communication with the Air Traffic Control Tower (ATCT), while operating within the airport traffic area.
>
> 6. At the time of your departure from Reno-Cannon, you did so without having received an appropriate clearance from the Air Traffic Control (ATC).
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> 7. Despite repeated instructions from the ATCT to stop, you departed Reno-Cannon airport from taxiway alpha heading southbound.

[2]The Administrator has filed a reply brief urging affirmance of the initial decision.

8. In fact, you departed Reno-Cannon without having followed the established departure procedure for that airport.

9. Reno-Cannon has an Airport Radar Service Area (ARSA).

10. On your above flight out of Reno-Cannon, you operated in Reno-Cannon's ARSA without establishing and then maintaining two-way radio communication with the control tower, and thereafter as instructed by ATC while operating in the ARSA.

11. Further, on the above flight, you failed to operate your transponder in the Reno-Cannon ARSA and other authorized airspace which required that an operating transponder be used.

12. In the alternative, you operated your aircraft in the airspace of an ARSA without that aircraft being equipped with an operable coded radar beacon transponder, as required by Federal Aviation Regulations.

13. At the time of the above-described flight, you operated said aircraft while you were under the influence of alcohol.

14. Your above-described operation of said aircraft on December 30, 1991, was reckless so as to have endangered the lives and property of others, in that there were a number of general aviation and large air carrier aircraft operating on the ground and in the air around the airport.[3]

At the hearing, the respondent chose not to challenge, or undertake to rebut or refute, the evidence the Administrator either put forth or was prepared to put forth in support of each of these allegations, at least to the extent such evidence showed

[3]The conduct described in paragraphs 5, 6, 7, 8, and 10 through 14 of the complaint was alleged to have been in violation of FAR sections 91.129(b), (f)(1) and (h), 91.130(d)(1), 91.215(b)(4)(i), (ii) and (c), 91.17(a)(2), and 91.13(a).

or would show that someone had operated an aircraft at Reno-Cannon on December 30, 1991 in the manner described in the complaint. Instead, the respondent maintained, and advanced evidence in his defense to prove, that the charges against him should be dismissed because he had not been to Reno on the date in question and thus was not the pilot-in-command of the aircraft whose operation the complaint addressed.[4] The law judge concluded, notwithstanding the respondent's efforts to establish that he had been misidentified,[5] that the Administrator had proved, by a preponderance of the evidence, that respondent was the aircraft's pilot-in-command. We find no error in that

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[4]Notwithstanding his concession at the hearing that someone else may have committed the conduct set forth in the complaint, respondent appears on appeal to question the adequacy of the evidence of that person's intoxication. In this regard we note that the cashier who sold aircraft fuel to the individual she believed to be under the influence testified that he had a strong smell of alcohol on his breath, that he had a flushed appearance with reddened eyes, and that he seemed to be off-balance. While the cashier had no formal training in the recognition of those who may be under the influence of alcohol, she did have experience related to a relative's treatment for alcoholism. In any event, we do not think any special training was necessary, for her unrefuted testimony as to respondent's appearance and comportment provided adequate proof for a finding of a violation of FAR section 91.17(a)(2).

[5]At the hearing respondent did not sit at the counsel table with his attorney, but in the audience section with three other individuals who, according to counsel for the Administrator, bore an appearance remarkably similar to respondent's. Moreover, respondent appears to have undertaken, for purposes of the hearing, at least, to have altered the way he looked at the time of the alleged incident by changing his hair color, by not wearing glasses, and by shaving off his mustache. In this latter connection, we agree with the Administrator that no particular significance need be accorded the fact that none of the three eyewitnesses recalled whether the individual they saw had a mustache, given the descriptions of his having been unshaven and unkempt.

conclusion.

Contrary to the position taken by respondent in his brief, we do not agree that the inability of the Administrator's three eyewitnesses to identify him positively in the hearing room seven months after the alleged incident compels a conclusion that the evidence was insufficient to establish that the respondent was the pilot-in-command of the aircraft, owned by him, whose registration number the witnesses did succeed in recording accurately.[6] Their separately given, contemporaneous descriptions of the pilot of the aircraft they saw are substantially consistent with one another's, and, more importantly, with that of another witness, the airport manager and fixed-base operator where respondent hangars his aircraft in Sacramento, California, who had known the respondent for about 10 years and who had seen him shortly after the alleged incident.[7] Moreover, this witness, when an FAA inspector first telephoned in the course of investigating the matter, was able to verify, while

[6]Respondent's contention that the evidence of the aircraft's registration number should be stricken as based on inadmissible double hearsay is without merit. The registration number testified to by an officer of the Reno Police Department was received via radio from airport police in hot pursuit of the aircraft as it took off from a taxiway in an apparent attempt to avoid apprehension. The number was the same as that given to the Reno Police officer by the person, called as an eyewitness at the hearing, who had (a) reported to the police that an individual she believed was intoxicated had just purchased fuel, and (b) recorded the registration number on a fuel receipt for the purchase. The evidence as to the number was thus admissible, corroborated hearsay.

[7]Even this witness, who knew the respondent well, had difficulty identifying the unbespectacled respondent without a mustache or his former hair color.

respondent was, by happenstance, actually present in his office, a unique feature of respondent's appearance that one of the eyewitnesses had reported, namely, that he had a crack in the right lens of his glasses. We think the law judge had ample circumstantial evidence on which to conclude that respondent was the individual the eyewitnesses had seen in connection with the refueling and operation of his aircraft at Reno-Cannon on December 30, 1991.[8]

We have carefully reviewed respondent's various procedural objections, but have found in them no basis for concluding that his claims of error prejudiced him in any significant or cognizable way in his defense of the charges. For example, respondent complains that counsel for the Administrator engaged in prejudicial misconduct by intentionally identifying respondent to one of the Administrator's eyewitnesses. However, apart from the fact that counsel's identification appears to have been inadvertent, it occurred after the witness had failed to identify with reasonable certainty who, among the four individuals in the hearing room posing as the respondent, was the individual she had seen on the date in question.

We also see no reversible error in the law judge's

[8]The respondent did not testify in his own behalf, and the law judge did not credit the testimony of his alibi witness that respondent had been with her during the relevant time frame. Although we agree with the respondent that the reasons for a credibility finding should be articulated, an implied credibility finding will be sustained where it is clear, as it is here, that the law judge has knowingly rejected testimony that, if accepted, would produce a different result on the merits.

acceptance into evidence of a documentary exhibit, consisting of respondent's two most recent medical certificate applications, that counsel for the Administrator had unintentionally neglected to furnish to respondent before the hearing pursuant to a discovery request. While that exhibit did establish that respondent was required to wear glasses when exercising the privileges of his airman certificate, that information was neither relevant to the charges against him nor even marginally dispositive of the matter of his identification when he was not flying. In any event, any error in the acceptance of these clearly admissible medical records, which respondent had obviously seen before and to which he appears to have no objection based on content, was harmless.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the order of revocation are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.